



1 of employment, the VA's Northwest Clinic. Perelman had been employed as a clerk with the VA  
2 Southern Nevada Healthcare System for approximately three years. SA Fitzgerald identified himself  
3 as a special agent with the VAOIG and told Perelman he was conducting an investigation and wished  
4 to speak with him. Perelman agreed to meet with SA Fitzgerald at 10 a.m. for an interview at  
5 Fitzgerald's office in the East Clinic.

6 Concerned about the interview, Perelman spoke to his union steward, Gregory Blackburn, in  
7 Blackburn's office. Blackburn had previously represented Perelman in a union matter. At the hearing  
8 Blackburn testified that Perelman, who seemed anxious, asked him to be his representative during an  
9 upcoming interview with an agent of the VAOIG. Blackburn called the agent, who was later identified  
10 as SA Fitzgerald, and asked him what he wanted to speak to Perelman about. Blackburn specifically  
11 inquired whether it was in connection with a criminal matter. The agent told Blackburn that it was.  
12 Blackburn testified that he "thanked him and I hung up the phone and then I turned to Mr. Perelman and  
13 I told him I can't help you because it's a criminal investigation." Blackburn explained further on cross  
14 examination, "I dismissed the union portion of our conversation at the time the gentleman told me it  
15 was a criminal investigation. I said our union vice president will not allow us to get involved in  
16 criminal investigations, so at that time I pretty much terminated the conversation as union steward, but  
17 I did give him advice." Specifically, Blackburn told Perelman, "if he got there and felt uncomfortable,  
18 he should thank them and walk out. I said that's what I would do." Though Blackburn's office door  
19 was open, the conversation was described as "private." Perelman left Blackburn's office and drove  
20 himself to the interview with the VAOIG. Two or three days later, Blackburn and Perelman spoke  
21 again, and Blackburn advised Perelman that he should hire a lawyer. Also at that time Perelman  
22 allegedly gave Blackburn a copy of a letter regarding his Purple Heart.

### 23 DISCUSSION

24 Federal Rule of Evidence 501 provides that "privileges shall be governed by the principles of  
25 the common law as they may be interpreted by the courts of the United States in light of reason and  
26 experience." Rule 501 is not intended to "freeze the law of privileges." *Trammel v. United States*, 445

1 U.S. 40, 47 (1980). Rather, the rule acknowledges the authority of the federal courts to continue “to  
2 develop rules of privilege on a case-by-case basis.” *Trammel*, 445 U.S. at 47 (citation and quotations  
3 omitted). In *Jaffee v. Redmond*, 518 U.S. 1, 10-15 (1996), the Supreme Court provided guidance for  
4 lower courts in determining whether to establish a new privilege under Rule 501, instructing that courts  
5 consider whether the privilege is “rooted in the imperative need for confidence and trust,” 518 U.S. at  
6 10 (internal quotation marks omitted), whether the privilege would “serve public ends,” *id.* at 11  
7 (internal quotation marks and alteration omitted), what evidentiary benefit would arise from denying  
8 the privilege, *id.* at 11-12, and the States’ rules on the subject, *id.* at 12-15.

9 While declining to recognize a union member-union official privilege, the court in *In re Grand*  
10 *Jury Subpoenas dated January 20* explained that four criteria are generally relevant in recognizing a  
11 new privilege: (1) the communication at issue must be made in confidence, (2) confidentiality must be  
12 essential to the maintenance of a full and satisfactory relationship between the parties, (3) the parties’  
13 relationship must be one that the community has decided ought to be sedulously fostered, and (4) the  
14 injury that would inure to the relationship by the disclosure of the communication must plainly  
15 outweigh the important societal interest in obtaining all the evidence necessary to ensure the correct  
16 disposal of litigation. *In re Grand Jury Subpoenas dated January 20, 1998*, 995 F. Supp. 332, 334  
17 (E.D.N.Y. 1998) (citing 8 J. Wigmore, *Evidence* § 2285 (McNaughton Rev. 1961). “It is the party  
18 seeking an exception from this principle that bears the burden of establishing the existence of a privilege  
19 and its applicability to a particular case.” *In re Grand Jury Subpoenas*, 995 F. Supp. at 334.

20 Defendant fails to meet his burden of establishing applicability of such a privilege in this  
21 particular case. First, he fails to adequately justify why a union privilege should be created and applied  
22 in the context of this criminal matter, in which no union related issue is implicated. Neither Perelman’s  
23 employment with the VA nor his membership in a union has anything to do with this case. Blackburn’s  
24 clear dismissal of his role as Perelman’s union steward upon learning that SA Fitzgerald was  
25 investigating a criminal matter only underscores this point; no vital interest of the union was implicated  
26 by the criminal investigation being conducted by the VAOIG.

1 Second, the conversation for which the defendant seeks the protection of a privilege did not  
2 occur between a union member and a union official discussing union related business. Blackburn's  
3 express dismissal of the "union portion" of the conversation took both men's statements outside of the  
4 union context. The advice Blackburn gave to Perelman was only personal, followed by the statement,  
5 "that's what I would do." Thus, while Perelman and Blackburn may have spoken privately, the men  
6 were not speaking within the ambit of a union relationship. They were speaking merely as coworkers.  
7 In that context there is not the "imperative need for confidence and trust" that would warrant the  
8 creation of an evidentiary privilege. *Jaffee v. Redmond*, 518 U.S. at 11.

9 **RECOMMENDATION**

10 Based on the foregoing, it is the recommendation of the undersigned United States Magistrate  
11 Judge that Perelman's Supplementary Motion to Suppress Privileged Statements (#28) should be  
12 denied.

13 DATED this 29th day of March, 2010.

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16 **LAWRENCE R. LEAVITT**  
17 **UNITED STATES MAGISTRATE JUDGE/**  
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